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No. 94-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent misstates some facts and ignores others to minimize the implications of the Eighth Circuit's erroneous interpretation of the False Claims Act's jurisdictional bar provision, 31 U.S.C. §3730(e)(4)(A). The most glaring omission in Respondent's brief (and the Eighth Circuit's opinion) and the single most important fact in considering whether jurisdiction exists over Respondent's False Claims Act suit is that the Pension Benefit Guaranty Corporation ("PBGC") began an investigation of Crane Co.'s publicly-disclosed actions before Respondent filed a suit under the False Claims Act based on the same conduct. The Eighth Circuit exacerbated its erroneous

interpretation of the False Claims Act ("FCA") by making a de novo review of the facts found and inferences drawn by the district court.

I. The Eighth Circuit's Interpretation Of §3730(e)(4)(A) Conflicts With Five Other Appellate Courts.

Only the Eighth, First[1], and Fourth[2] Circuits would allow a suit under the False Claims Act based on public disclosures that caused the government to investigate the alleged false claim. The Second[3], Third[4], Ninth[5], Tenth[6], and District of Columbia[7] Circuits would not. The majority view of the FCA's jurisdictional bar is that only true whistleblowers should be allowed to maintain an FCA action. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

In this case, the PBGC began investigating CF&I's underfunded pension liabilities based on public disclosures about the issue.

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[1] *United States ex rel. Prawer v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994) (*qui tam* suit not barred if it provides an appropriate return to the government).

[2] *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994) (*qui tam* suit not barred unless it is derived from a previous disclosure).

[3] *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992)(*qui tam* suit barred when based on allegations disclosed during government investigation).

[4] *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991)(law firm's *qui tam* suit barred when based on information gained in discovery).

[5] *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992)(*qui tam* suit barred if relator has no hand in the public disclosure of the allegations).

[6] *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (*qui tam* suit barred when based on allegations disclosed in civil suit, Senate hearings, and news reports).

[7] *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

The PBGC began its investigation before Respondent made his first claim of fraud. In his Dissent from the panel's opinion, Judge Magill notes the PBGC's investigation and the fact that it resulted from public disclosures.[8]

Respondent does not dispute those facts. Instead, Respondent attempts to hide from them by disingenuously arguing that Judge Magill relied on those facts in his Dissent without citing to evidence. The fact of the PBGC's investigation is established by the Affidavit of Stephen J. Segreto, an attorney for the Department of Justice, that was submitted both to the district court and the Eighth Circuit.[9] The same public disclosures that put the PBGC on inquiry notice of a possible fraud and caused it to investigate are the basis of Respondent's FCA suit.

This Court should clarify that the majority of the circuit courts of appeal are correct in interpreting §3730(e)(4)(A) to bar such parasitic suits.

II. The Court Of Appeal's Determination of Federal Subject Matter Jurisdiction By An Apparent De Novo Review Of The District Court's Findings Is Contrary to *Anderson v. City of Bessemer City*.

Respondent hopes to evade the mandate of *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) by ignoring the inferences from undisputed facts drawn by the Eighth Circuit that were directly contrary to the inferences drawn by the district court. When a district court chooses among disputed inferences from uncontradicted facts, its findings are entitled to review under the clearly erroneous standard. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960). *See also Sheehan v. Gustafson*, 967 F.2d 1214 (8th Cir. 1992).

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[8] Appendix at 30A.

[9] Stephen J. Segreto's affidavit was submitted to the Eighth Circuit in Appellee Crane Co.'s Appendix at A307-08.

The district court found that publicly-disclosed facts and circumstances were sufficient to put the government on inquiry notice of fraud. The district court also found that Respondent alleged substantially the same facts and circumstances in his complaint. Those findings of the district court are subject to the clearly erroneous standard of review.

Without discussion of the standard of review, the court of appeals second-guessed the district court's findings without ever making a determination that those findings were clearly erroneous. By doing so, the appellate court disregarded *Anderson v. City of Bessemer City*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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